

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Nondiscrimination in the
Distribution of Interactive Television
Services Over Cable

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CS Docket No. 01-7

**COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION**

I. INTRODUCTION

The Progress & Freedom Foundation (“PFF” or “Foundation”), a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy, hereby submits these comments in response to the Notice of Inquiry in this Interactive Television (“ITV”) proceeding.¹

PFF’s research and analysis focuses on issues related to the deployment of broadband digital communications and the consumer benefits which will flow from widespread broadband deployment and the resulting emergence of a digital economy.² At a major conference held on

¹ Nondiscrimination in the Distribution of Interactive Television Services Over Cable, FCC 01-15, CS Docket No. 01-7, January 18, 2001 (hereinafter “Notice of Inquiry” or “NOI”).

² See, for example, Comments of The Progress & Freedom Foundation, GN Docket No. 00-185, December 1, 2000; Comments of The Progress & Freedom Foundation, CC Docket 98-146, September 14, 1998; Comments of The Progress and Freedom Foundation, CC Docket No. 98-184, February 15, 2000; see also Jeffrey A. Eisenach, Testimony Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, (April 22, 1998); Randolph J. May, “On Uneven Playing fields: The FCC’s Broadband Schizophrenia,” *Progress on Point* 6.11 (December 1999); Jeffrey A. Eisenach, “Into the Fray: The Computer Industry Flexes Its Muscle on Bandwidth,” *Progress on Point* 5.9 (December 1998); and, Donald W. McClellan, Jr.,

December 8, 2000, PFF released a series of papers authored by policy and legal experts in the communications field, recommending significant reforms in several areas.³ Several of the papers addressed the difficulties—from both a policy and legal perspective--of applying legacy regulatory models to newly emerging and converging broadband media and the harm suffered by consumers from such regulatory overreaching.⁴

In our view, the Commission should terminate this inquiry and await further marketplace developments. As the Commission acknowledges at the outset of the Notice of Inquiry, “[t]he nature of ITV services is evolving rapidly, with constant and continuous technological changes and evolving business models making it difficult to specify a definition.”⁵ At an earlier time and under different circumstances, the oft-repeated adage around the Commission-- “it’s only an inquiry”-- may have been an adequate response to allay the concerns about the real-world impacts of launching another regulatory initiative.

In today’s rapidly changing technological marketplace environment, however, even the launching of regulatory inquiries can do more harm than good. Initiating such inquiries may well affect – even if inadvertently – business and technology decisions as current and potential market participants assume full-battle mode in an effort to “shape the process” early on. The likelihood of the harm outweighing the benefit is more acute when the “constant” and “continuous” changes to which the Commission refers make it difficult even to specify a “definition” for the potential object of the Commission’s regulatory concern.

“A Containment Policy for Protecting the Internet from Regulation: The Bandwidth Imperative,” *Progress on Point* 4.5 (August 1997).

³ Jeffrey A. Eisenach and Randolph J. May, *Communications Deregulation and FCC Reform: What Comes Next?* (Conference Edition, December 2000).

⁴ See Jeffrey A. Eisenach and Randolph J. May, *Communications Deregulation and FCC Reform: Finishing the Job*; Robert W. Crandall, *Local and Long Distance Competition: Replacing Regulation With Competition*; Kenneth Gordon, *Reforming Universal Service One More Time*; and L.A.Powe, Jr., *Program Content Regulation Revisited*, all from Eisenach and May, *supra* note 3..

⁵ NOI, at para. 6.

II. BACKGROUND

The Commission says that video content providers are in the process of developing technology to enable increased viewer control by integrating traditional video streams with data services including web content, real-time interaction with other viewers, and television commerce, and it calls this phenomenon Interactive Television.⁶ It tentatively describes ITV as including subscriber-initiated menu choices, alternative video streams (such as a different camera angle), and fully interactive content to supplement or customize the programming.⁷

According to the Commission, ITV services require a two-way connection with the subscriber.⁸ The downstream point-to-multipoint video signal is generally delivered using existing video delivery platforms. The upstream and interactive content, however, generally is transmitted in Internet Protocol (IP) format which can travel over the facilities of either the video platform or an alternative IP connection.⁹ Customer premises equipment coordinates ITV content with the video signal by responding to triggers in the video stream or subscriber inputs to bring content or interactive services to the subscriber.¹⁰

The Commission throws out literally hundreds of questions in this inquiry. This torrent apparently is stimulated by the Commission's concern that video delivery platform operators, particularly cable operators, might choose to vertically integrate with Interactive Television providers. Then, if the video delivery platform market is not competitive, the Commission speculates that such a vertically integrated company might have the incentive to discriminate

⁶ NOI, at para. 1.

⁷ NOI, at paras. 6-7.

⁸ NOI, at para. 12.

⁹ NOI, at para. 12.

¹⁰ NOI, at para. 13.

against rival ITV providers.¹¹ The Commission further speculates that this discrimination might hinder development of ITV primarily by limiting the amount of information the unaffiliated ITV providers may be allowed to include in their downstream and upstream signals.

III. DISCUSSION

This inquiry is in some ways similar to the Commission's inquiry in the "Internet Over Cable" proceeding.¹² Thus, some of the questions posed by the Commission relate to the market for the high-speed access connections over cable which presumably would be a component in some ITV applications. The principal thrust of the Commission's "Internet Over Cable" inquiry is whether the agency, by regulatory fiat, should impose some form of mandatory "open access" regime on cable modem service. And underlying this new inquiry is the core issue of whether the Commission should impose some form of "open access" applicable to ITV services on cable operators and other video platform providers.

In the "Internet Over Cable" inquiry, PFF argued that the Commission should rely on the marketplace, rather than the imposition of costly, unwieldy, and difficult-to-implement regulatory solutions, to meet consumers' needs for the access services they want.¹³ Pointing to the Commission's own findings concerning the continuing development of a competitive environment for broadband delivery platforms and growing consumer demand for broadband services, our comments urged the Commission to continue its "hands off" policy towards the broadband Internet services provided via the cable platform.

While this ITV inquiry raises in the Commission's mind's eye many questions similar to those in the "Internet Over Cable" inquiry, this one is even more problematic in the sense that the

¹¹ NOI, at para. 22.

¹² Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC 00-355, GN Docket No. 00-185, September 28, 2000.

service and the market the Commission are considering are much less defined. After all, while Internet access service is still developing—and no doubt will continue to develop as technology and business models change—at least there is an existing service in the marketplace with some semblance of commonly understood parameters. That is certainly not yet the case with ITV services, and that is why the Commission finds “it difficult to specify a definition” and asks “what services constitute ITV services.”¹⁴

The Commission surmises cable operators may have a competitive advantage with regard to ITV services because the cable platform is currently capable of transmitting both the high-capacity downstream signal as well as the upstream and interactive signal.¹⁵ But the NOI recognizes that advances in competitive technology platforms may rapidly change cable’s perceived current dominance in this practically non-existent market.¹⁶ Moreover, the way the business models for ITV services evolve in the real world in response to consumer demand may alter the factual basis for conjectural fears that any one ITV platform could exercise dominant market power.

In its recently released *Video Programming Competition Report*, the Commission’s bottom-line conclusion is that “competitive alternatives and consumer choices continue to develop.”¹⁷ While cable is still the dominant platform for the delivery of multichannel video programming to consumers, the Commission found that the non-cable multichannel providers are gaining subscribers at a considerably faster rate than are cable operators.¹⁸ The *Seventh Report*

¹³ See Comments of The Progress & Freedom Foundation, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, FCC 00-355, GN Docket No. 00-185, filed December 1, 2000.

¹⁴ NOI, at paras. 1 and 6.

¹⁵ NOI, at para. 20.

¹⁶ NOI, at para. 19.

¹⁷ Seventh Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 01-1, CS Docket No. 00-132, January 8, 2001, at para. 5.

¹⁸ Id., at para. 6-7.

contains a wealth of data that supports the Commission's finding that consumer choice continues to grow.

And further to the point, the *Seventh Report* examines "Interactive Television" and states that ITV services "are beginning to be offered through cable, satellite, and terrestrial technologies."¹⁹ The Commission declares that ITV "provides or has the potential to provide a wide range of services, including video on demand ("VOD"), e-mail, TV-based commerce ("e-commerce"), Internet access, personal video recorder ("PVR") functionality, program-related content, and electronic couponing."²⁰ You can bet that as ITV develops, morphs, and re-morphs, there will be more new acronyms and names to go along with VOD, PVR, e-couponing, and such. Indeed, in the NOI itself, the Commission has coined "t-commerce" for television commerce.²¹

All this is to say that, in light of the fact that competition continues to develop in the broadband and multichannel video marketplaces and ITV services themselves are in their infancy still sprouting new acronyms, the Commission would be wise to terminate this inquiry. The Commission should be very reluctant to continue inquiries that posit potential regulatory solutions involving public utility-like access and non-discrimination requirements under circumstances of so much marketplace uncertainty. Rather, for now, it should announce that it is backing off.

Closing this inquiry would send a positive signal that existing and potential market participants can move forward with their technical and business planning without trying to second-guess what form of regulatory restraints they may be saddled with under this or that service variation. And they won't expend their resources gaming the regulatory process by

¹⁹ Id., at para. 206.

²⁰ Id.

trying to saddle their potential competitors with regulatory constraints. At a time when the telecommunications and related high-tech sectors are under significant pressure in the financial markets, a signal from the Commission that it is turning away from more regulatory policies—in this instance and others—should help provide a spark for continuing investment for innovative new business models.

Discontinuing this inquiry does not mean, of course, that the Commission should not continue to monitor developments regarding ITV and collect information to inform itself. Indeed, inquiries soliciting public comment leading to the annual video programming reports provide a forum for doing so, and the Commission for several years has been gathering information there on ITV. And there are less formal information-gathering and monitoring means as well, such as the participation of Commission personnel in seminars, conferences, and the like.

Having in mind the very difficult questions concerning the Commission's statutory authority to fashion an ITV regulatory regime, the Commission should not reach out to put itself into a position to opine on this issue prematurely.²² And as the NOI acknowledges, there are "constitutional implications" raised by the adoption of regulations requiring nondiscriminatory treatment (take your pick, read "open access" or "forced sharing") for unaffiliated ITV providers. In light of the D.C. Circuit's March 2 decision in *Time Warner Entertainment Co., Inc. v. FCC*,²³ reversing and remanding, under a First Amendment backdrop, certain restrictions on the ability of cable operators to distribute their own programming, these constitutional limitations must be taken seriously. Indeed, they quite likely would prove insurmountable to the type of mandatory

²¹ NOI, at para. 1. (Perhaps someone else coined "t-commerce". Regardless, it's pretty catchy.)

²² See the Commission's discussion of its authority at paras. 43-53 of the NOI for a discussion of the difficult definitional and related issues raised if the Commission were to proceed down a regulatory path.

²³ *Time Warner Entertainment Co., Inc. v. FCC*, No. 94-1035 (D.C. Cir., decided March 2, 2001.)

access regime about which the Commission speculates, because, unlike the restrictions at issue in *Time Warner*, the statutory basis for such an ITV regime is more difficult to fathom.

IV. CONCLUSION

For the all of the foregoing reasons, the Commission should terminate the “Interactive Television” inquiry and not proceed further at this time. It can revisit this matter in the future if it turns out that some form of marketplace failure develops for some form of service over which the Commission arguably possesses some form of jurisdiction and for which some form of remedy might be available which is consistent with the First Amendment.

Respectfully submitted,

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